The CJEU (Unintentionally) Opens New Avenues of “Free Choice” in Asylum Law

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With the CJEU judgment *H & R* of 2 April 2019, the never-ending story of clarifying the preconditions for Dublin transfers took a turn that will again entail needs for clarification. The CJEU has decided that a Member State in which a second application is made (in principle) does not have to check on the responsibility for carrying out the asylum procedure within the framework of the take-back procedure. It is the first Member State in which an application is made that has to determine responsibility and, in the case of secondary movement, to continue doing so after the person concerned has been returned. If the Member State of the first application already completed this procedure and has declared itself to be responsible, another examination of the responsibility question in the Member State of the second application would run counter to the *effet utile* of the Dublin system. The CJEU’s interpretation was essentially motivated by the aim to keep, or render, the Dublin system efficient and to lessen the time and effort involved in handling secondary migrations. Was it successful?

The CJEU itself notes that the attempt to achieve efficiency of allocation could, again, clash with the (prior) necessity to guarantee the *effet utile* of primary law, particularly of the Charter of Fundamental Rights (CFR). If there is generally no checking of responsibility in the take-back procedure, the persons concerned can, *inter alia*, no longer claim that the Member State of the second application is the one responsible for them. And in the Member State of the first application, the time limit for initiating a (further) procedure for transfer to the “right” state has mostly expired by the time of completing the take back procedure.

The final allocation of an asylum seeker to a country that is not responsible according to the Dublin criteria does not always involve a fundamental rights issue, though. In fact, the point of the whole system was not to allocate asylum seekers to the “right” state in every case. Instead, it was to agree on a definite allocation as efficiently as possible (this distinction got lost in the recent jurisprudence of the CJEU on the possibility of appealing for “right” allocation). The CJEU now seems to be noticing that matters become really complicated when the asylum seekers can always appeal to obtain an additional examination leading to a right allocation every time they are transferred in the course of their often multiple secondary movements, independently of whether their desire for being allocated to a certain state is based on an interest protected within the Dublin system or not.

The wish for allocation to the “right” state is, however, based on a protected interest at least when the relevant determination of allocation is intended to implement fundamental rights. In its judgment of 2 April 2019, the CJEU names Articles 7 and

24 CFR as provisions that may be violated by incorrect allocations; they relate to all the criteria serving to protect minors, families and dependents. Another provision with obvious relevance to transfer is Article 4 CFR, whose requirements, as far as problems *within the country of destination* are concerned, are met by Article 3 (2) 2 Dublin III Regulation, otherwise by means of time limit-related change of responsibility or Art. 17 Dublin III Regulation (sub III.2 and V.). I am not concerned to enumerate here all possible problems of fundamental rights in connection with Dublin transfers, yet Art. 18 CFR comes to mind with its "due respect" for the Geneva Convention: The international discussion about the requirements under refugee law for safe third country transfers entails questions that the Common European Asylum System will have to raise (the opportunity was missed in CJEU *Ibrahim* (para 100)).

In the cases on which the present CJEU judgment is based, both the persons involved in take-back procedures had, for family reasons, argued that the Member State where the second application was lodged was responsible. Through the latter's unwillingness to examine the responsibility question, there was a risk of a final allocation to the Member State where the first application was lodged, which would have run counter to Article 9 Dublin III Regulation. The CJEU solved the problem by ruling that, despite the take-back procedure and by way of exception, the second Member State had to examine this criterion, and, as appropriate, to declare itself responsible – but only if the persons concerned provided information "clearly establishing that it should be regarded […] as responsible for examining the application".

Just for readers interested in coherent legal reasoning, and not willing to give more importance to the *effet utile* of secondary law than to that of the Charter rights: Doesn't that raise questions? Do we only protect fundamental rights when their violation is *clearly established*? Isn't it enough that the transferring Member State violates one of them, and shouldn't an *arguable claim* in this respect be examined as usual? And, moreover, wouldn't the fact that the CJEU immediately had to make a "hole" in its own interpretation so that it could remain in conformity with primary law, and that, due to the above mentioned other rights to be protected, we have to expect more holes – wouldn't that be reason enough again to question an interpretation that produces such a Swiss cheese? And consequently to re-examine the interpretation with which the CJEU began its argumentation (and then perhaps also include Articles 7 (3) and 17 Dublin III Regulation)?

I do not want to try to do that here, but only to remark that an attempt to achieve a coherent final interpretation by thoroughly considering primary law as well – instead of an interpretation initially one-sided in its orientation to allocation efficiency and then perforated with some exceptions in the light of fundamental rights – would come closer to my understanding of a legal interpretation in conformity with primary law. I do recognize that it is more difficult at the transnational level for a number of reasons. Such an approach, instead of a never-ending series of *ad hoc* solutions, would bring out much more clearly where the problem really lies: in the unavoidable complexity of the issues and the inevitable clashes between efficiency and human and refugee rights within systems of forced allocation that involve Member States

with very different standards and life opportunities. If the system of forced allocation is retained, and if there is not done justice to the interests of the allocated persons leastwise as far as possible in terms of burden-sharing – the key issue will boil down to a choice between allocating people efficiently and protecting their human and refugee rights. Primary law offers a clear answer to resolve this kind of conflict. The CJEU does not always.

Has the system at least become more efficient with the solution chosen by the CJEU? Asylum seekers willing to move onwards, and who have their eye on a destination country that is not responsible for them, will probably be glad. They can try to lodge their first application in their country of preference and then migrate further, only once, and lodge a second application in another Member State. The latter will have to initiate a take-back procedure and return the applicant, without responsibility check, to the Member State of the first application, i.e. to their preferred asylum state, although it is not the one initially responsible for them. And then things come to a halt because the time limit has usually expired.

We may assume that this is not the outcome desired by the CJEU. An interpretation of legal provisions thinking beyond the individual case would consider the real consequences of variable interpretation – also realities arising through unintended changes of behaviour by the persons concerned. If, however, the Dublin system is understood as a system that does not intend to necessarily allocate everyone to the “right” state (apart from allocations on grounds of fundamental rights) but seeks to decide on responsibility efficiently – then ending up in the preferred country is better than a result giving rise to *multiple* secondary migrations.
